

IT 96-51

Tax Type: INCOME TAX

Issue: Penalty Under 1002(d) - Failure To File/Pay Withholding

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
ADMINISTRATIVE HEARINGS DIVISION
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS,)	No.
)	
Petitioner)	
)	
v.)	SSN:
)	
TAXPAYER,)	
as responsible officer)	
of CORPORATION)	Linda K. Cliffel,
)	Admin. Law Judge
)	

RECOMMENDATION FOR DISPOSITION

APPEARANCES: No one appeared on behalf of TAXPAYER; Thomas Jacobsen, Special Assistant Attorney General, for the Illinois Department of Revenue.

SYNOPSIS:

This matter comes on for hearing pursuant to the protest of Notice of Deficiency ("NOD") Number XXXX for TAXPAYER, issued by the Department against him on April 7, 1994 as a responsible party of CORPORATION (hereinafter referred to as "CORPORATION"). The NOD represents officer's liability for Withholding Tax admitted by CORPORATION as due to the Department for the fourth quarter 1990 but which is unpaid.

A hearing in this matter was held on February 7, 1995. Following the submission of all evidence and a review of the record, it is recommended that this matter be resolved in favor of the taxpayer.

FINDINGS OF FACT:

1. CORPORATION was formed to develop and produce a notebook-sized computer.
(Tr. pp. 16-17, 417)

2. XXXXX provided the start-up capital for the company. (Tr. pp. 15, 17-24, 165-166)
3. TAXPAYER was a Vice President of the company and provided the engineering expertise for designing the computer. (Tr. p. 129)
4. VICE PRESIDENT was a Vice President of the Company and was in charge of marketing and advertising.
5. PRESIDENT was the President of CORPORATION and was in charge of the operation of the company. (Tr. pp. 124, 129-130)
6. The Directors of the corporation were, the outside accountant for the company. (Tr. pp. 124 and 131) XXXXX was the Chairman of the Board of CORPORATION. (Tr. p. 123)
7. TREASURER was the Treasurer of the company. (Tr. p. 131)
8. The signature authority for the corporate bank account was held by XXXXX, TAXPAYER, and PRESIDENT and VICE PRESIDENT. (Tr. p. 160)
9. Two signatures were required on corporate checks. Typically, PRESIDENT signed the checks and submitted them to Pace for countersignature. (Tr. pp. 164-165, 167)
10. A meeting was held in January of 1991 to discuss the payroll tax situation. XXXXX agreed to fund the money needed to pay the payroll taxes on the condition that CORPORATION gave him a promissory note in that amount and PRESIDENT, TAXPAYER, and VICE PRESIDENT each give up a 5% equity holding in the company. (Tr. pp. 177-178)
11. On January 31, 1991, the agreement between XXXXX, the PRESIDENTS, and TAXPAYER was executed, and PRESIDENT was fired. (Tr. p. 196)
12. After PRESIDENT's termination, TAXPAYER remained with CORPORATION in an attempt to finish the product. TAXPAYER received approximately \$11,000 in compensation from CORPORATION for 1991. (Tr. p. 406)

CONCLUSIONS OF LAW:

The penalty at issue herein is based upon the withholding tax liability of CORPORATION for the fourth quarter of 1990. The corporation submitted to the Department the required tax return without payment for the amount stated therein. The Department seeks to impose personal liability on TAXPAYER pursuant to Ill. Rev. Stat. 1991, ch. 120, ¶1002(d),¹ which provides:

Any person required to collect, truthfully account for, and pay over the tax imposed by this Act who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over...For purposes of this subsection, the term "person" includes an individual, corporation or partnership, or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs.

CORPORATION² was created to design and manufacture a notebook-size computer. The other principals in the corporation were VICE PRESIDENT, who was in charge of marketing, PRESIDENT, who was in charge of operations, and XXXXX, who provided the funding.

TAXPAYER is an engineer, and he was responsible for the concept and the development of the notebook computer. He was completely consumed by the process of developing this computer and allowed the administrative chores of the corporation to be handled by others. He was unaware of what bills were paid or the financial status of the company. Further, from his testimony it is clear that the payroll process and withholding taxes were entirely foreign to him.

The duty imposed by statute to collect, account for and pay over payroll taxes is generally found in those corporate officers who participate in decisions concerning the payment of debtors and disbursement of funds. See,

¹ The liability for payroll taxes herein accrued in 1991. Therefore, the statute which applies is Ill. Rev. Stat. 1991, ch. 120, ¶1002(d). The Uniform Penalty and Interest Act, 35 ILCS 735/3-7, which provides for a personal liability penalty, is effective for taxes incurred January 1, 1994 and later.

² Originally formed as COMPUTER.

Monday v. United States, 421 F.2d 1210 (7th Cir. 1970), *cert. denied*, 400 U.S. 821 (1970). TAXPAYER had none of these responsibilities.

He learned of the payroll tax liability for the fourth quarter 1990 at the meeting in January 1991 between XXXXX, PRESIDENT and VICE PRESIDENT and himself. At that time XXXXX agreed to loan the corporation money in return for a promissory note from CORPORATION and stock from each of the principals. It was not unreasonable for TAXPAYER to believe that this resolved the problem.

I find that TAXPAYER has presented sufficient evidence to rebut the Department's *prima facie* case, and that he is not a responsible party pursuant to Section 1002(d).

WHEREFORE, for the reasons stated above, it is my recommendation that the Notices of Deficiency against TAXPAYER be disallowed.

Date:

Linda K. Cliffl
Administrative Law Judge